No. 04-21-00242-CV

IN THE COURT OF APPEALS FOR THE
FOURTH DISTRICT OF TEXAS AT SAN ANTONIO

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. AND WILLIAM L. MAGNESS,

Appellants,

v.

CPS ENERGY,

Appellee.

AMICUS CURIAE BRIEF OF THE PUBLIC UTILITY COMMISSION OF TEXAS

On Appeal from the Bexar County District Court
Cause No. 2021-C1-04574

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INTEREST OF THE PUBLIC UTILITY COMMISSION OF TEXAS

The Texas Legislature has charged the Public Utility Commission of Texas, the State's electric-market regulator, with certifying and overseeing an independent organization to manage the operation of Texas's electric grid and electric markets and accounting of wholesale electric sales. Pursuant to this authority, the Commission has designated the Electric Reliability Council of Texas as the independent organization, subject to the Commission's comprehensive regulatory oversight. The claims against ERCOT in this case arise from ERCOT's responsibilities as the Commission's designated manager of the electric grid for most of the State and its accounting for wholesale electric sales in the ERCOT market.

The Public Utility Commission of Texas ("Commission") submits this *amicus curiae* brief in support of Appellant Electric Reliability Council of Texas, Inc. ("ERCOT") in the suit brought by Appellee CPS Energy ("CPS").

I. Introduction and Summary of the Argument

CPS's claims against ERCOT in this lawsuit relating to its actions during and after the Winter Storm Uri emergency all arise from ERCOT's performance of an important governmental function as an arm of the State of Texas—the management of the ERCOT electric grid and the accounting for wholesale sales of electricity in the ERCOT market. The Commission has exclusive jurisdiction over allegations such as CPS's. The Texas Legislature has established a "pervasive regulatory scheme" over the electric markets and ERCOT's performance as the grid operator, including its compliance with the Commission's directives.

CPS's suit—if successful—would wrest the authority to oversee ERCOT's performance and fashion an appropriate remedy for any ERCOT misconduct away from the expert agency the Texas Legislature charged with that role and give it to a state district court. The state district courts are not positioned to consider the potential serious negative impacts of its judgment upon the ERCOT market as a whole and the stability of the ERCOT grid. Most alarmingly, CPS asks the district court to "re-price" wholesale electric transactions during the Winter Storm Uri

emergency—something that both the Commission and the Texas Legislature, upon comprehensive consideration in the wake of the storm, have declined to do.

CPS's claims in its Bexar County suit are contrary to the Legislative design. The Public Utility Regulatory Act ("PURA"), TEX. UTIL. CODE §§ 11.001–66.016, has charged the Commission with ensuring the reliability of the electric grid and overseeing the State's electric markets. The Commission has delegated these responsibilities in large part to ERCOT, but subject to the Commission's continuing oversight and control. This oversight includes addressing allegations about ERCOT's performance as the Commission's designated independent organization—including those that CPS has asserted in this suit. The Legislature has mandated that the Commission—rather than the courts—review ERCOT's performance and impose any appropriate remedy. Coupled with this regulatory oversight is ERCOT's immunity against such claims arising from ERCOT's performance of a statutory function as an arm of the State.

II. Statement of Facts

A. The Commission certified ERCOT to manage Texas's electric markets, subject to the Commission's continuing oversight and control.

When Texas moved from fully regulated to competitive retail electricity sales in most of the State almost two decades ago, the Legislature recognized that an independent entity was needed to manage the electric grid. *See BP Chems., Inc. v.*

AEP Tex. Cent. Co., 198 S.W.3d 449, 451–52 (Tex. App.—Corpus Christi 2006, no pet.). The unbundling of generation, transmission and distribution, and retail electric services (previously all provided by vertically integrated utilities) meant that retailers serving end users could buy power from any generator. Wholesale power sales between power generators and entities serving end-users became more important to the newly deregulated Texas market. That meant that managing the transmission of electricity across the grid (the interconnected wires owned by a number of different providers) became more challenging—and much more important. *See FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 61 (Tex. 2014); *TXU Generation Co., L.P. v. Pub. Util. Comm'n of Tex.*, 165 S.W.3d 821, 827–28 (Tex. App.—Austin 2005, pet. denied).

Pursuant to TEX. UTIL. CODE § 39.151(a), the Commission has certified ERCOT as this "independent organization." ERCOT thus is responsible for ensuring (1) that all buyers and sellers have nondiscriminatory access to transmission and distribution systems; (2) the reliability and adequacy of the regional electrical network; (3) the availability of information to customers regarding their retail electric provider choices; and (4) the accurate accounting for the production and delivery of electricity among generators and wholesale buyers and sellers. *Id*.; *see also Pub. Util. Comm'n of Tex. v. Constellation Energy Commodities Grp., Inc*., 351 S.W.3d 588, 591 (Tex. App.—Austin 2011, pet. denied) ("ERCOT . . . ensur[es] the

reliability and adequacy of the electric grid, as well as establishing, scheduling, and overseeing transaction settlement procedures."). "Independent" here refers to the organization's independence from market participants, not its independence from the Commission. *See* TEX. UTIL. CODE § 39.151(b) (providing that the designated "independent organization" must be "sufficiently independent of any producer or seller of electricity that its decisions will not be unduly influenced by any producer or seller").

Although a voluntary utility coordination organization had previously existed, post-certification ERCOT took on critical governmental functions as specified in the Texas Utilities Code. The ERCOT power region covers 75% of Texas's geographic area and 90% of the State's electric use of about 24 million consumers. As the grid manager for this region designated under the Utilities Code, ERCOT performs statutory functions under Texas law and is subject to open meeting requirements, TEX. UTIL. CODE § 39.1511, and sunset review, TEX. UTIL. CODE § 39.151(n). The Texas Legislature has charged the Commission not only with certifying an independent organization like ERCOT but, as explained below, also overseeing it and remedying any issues with its performance.

B. ERCOT's management of the electric grid and accounting for wholesale electric sales pursuant to its Protocols.

Under this general framework, ERCOT has two important roles in particular: keeping the grid in balance and acting as a clearinghouse for amounts paid by electric

purchasers to generators in the ERCOT market. Foremost among these is ensuring that the amount of electricity that generators are placing on the grid balances the amount that consumers are using. In addition, under PURA, ERCOT must "ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region." TEX. UTIL. CODE § 39.151(a)(4).

Pursuant to this statutory mandate as the Commission's designated "independent organization," ERCOT schedules the power deliveries over a grid including more than 700 generation units and over 46,000 miles of transmission lines connecting generators with the end users of electricity.[1] ERCOT operates the wholesale electric market in which generators sell their electricity to retail electric providers, municipally owned utilities like CPS, electric cooperatives, and other entities that serve retail customers and use electricity. It determines the market clearing price of energy and other ancillary services necessary for the operation of the grid. 16 TEX. ADMIN. CODE § 25.501(a). It is "central counterparty for all [wholesale electric] transactions" and thus "is deemed to be the sole buyer to each seller, and the sole seller to each buyer, of all energy." ERCOT Protocols § 1.2(4).[2]

1 *About ERCOT*, http://www.ercot.com/about (last visited November 2, 2021).
2 The ERCOT protocols are available at http://www.ercot.com/mktrules/nprotocols/current.

In this function ERCOT acts solely as a clearinghouse for market participants' transactions and payments but itself generates no profit.

Appellant CPS Energy, a municipally owned utility, has not opened its service area to retail electric competition but nonetheless participates in the ERCOT wholesale electricity market. TEX. UTIL. CODE § 35.002. As it both owns generation and serves electric end-users, CPS is both a buyer and seller in the ERCOT market. CPS's rights and obligations with respect to its participation in that wholesale market are governed by Commission rules, the ERCOT operating rules or "Protocols" and a standard form Market Participant Agreement. The terms of this agreement are set by the Protocols, which obligate ERCOT to execute it and agree to abide by its terms. *See* ERCOT Protocols §§ 16.1, 22A; CR 197. The Protocols are developed through a stakeholder process that includes market participants such as CPS. *See* ERCOT Protocols § 1.1(1). Like all participants in that wholesale market, CPS is required to follow ERCOT's rules governing the operation of the market. *See* TEX. UTIL. CODE § 39.151(j); *BP Chems., Inc. v. AEP Tex. Cent. Co.*, 198 S.W.3d 449, 452 (Tex. App.—Corpus Christi 2006, no pet.) (all participants in the ERCOT market are required to "abide by the procedures established by ERCOT" (citing TEX. UTIL. CODE § 39.151(j))). The ERCOT Protocols have the force and effect of state law. *Pub. Util. Comm'n of Tex. v. Constellation Energy Commodities Grp., Inc*., 351 S.W.3d 588, 594–95 (Tex. App.—Austin 2011, pet. denied).

C. ERCOT's implementation of the Commission's directives during Winter Storm Uri, and the application of the short-payment and uplift provisions in the ERCOT protocols.

1. The Commission's directives during Winter Storm Uri.

During the unprecedented cold weather of Winter Storm Uri, demand for electricity greatly exceeded the available supply due to increased need for electricity and the extraordinary failure of generation units. For much of the emergency, half of Texas's electric generation units were out of commission. As a result, ERCOT was forced to declare Emergency Energy Alert Level 3 ("EEA3") and direct the operators of the transmission system to curtail load ("load shed"), that is, disconnect many customers from the grid. The Commission issued two directives to ERCOT during the emergency. In these orders, the Commission determined that during the emergency the wholesale pricing occurring in the ERCOT market was inconsistent with the fundamental design of the market. The Commission noted that, under the Commission's scarcity pricing mechanism in its rules, under such extreme scarcity conditions (when load was being shed) wholesale prices should be at the maximum. It further noted that the system-wide offer cap under Commission rules is $9,000 MWh, but wholesale pricing during the emergency was significantly below that. The Commission "direct[ed] ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT's scarcity pricing signals."[3] The February 16 order

3 Tex. Pub. Util. Comm'n, *Oversight of the Electric Reliability Council of Texas*, Project No.

largely repeated the February 15 order but stated that the Commission had "determin[ed] that its directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 should be and hereby is rescinded."[4]

2. ERCOT's accounting for wholesale power sales in the wake of Winter Storm Uri.

As a result of the unprecedented weather, some market participants did not pay for all the electricity they had purchased. In this event, under its protocols, ERCOT implements a "short payment" procedure in which it reduces payments to market participants that are owed money to account for those that have defaulted on their obligations. *See* ERCOT Protocol § 9.19(1)(d) ("If . . . ERCOT still does not have sufficient funds to pay all amounts that it owes to Settlement Invoice Recipients in full, ERCOT shall . . . reduce payments to all Settlement Invoice Recipients owed monies from ERCOT."). As a result of Winter Storm Uri, billions of dollars owed by electricity purchasers was not paid. *See* CR 191–92 ¶ 6–7; CR 298–310. Thus, upon ERCOT's required implementation of short-payment procedure, some market participants such as generators did not receive the full amount they otherwise would have received. CPS complains that it did not receive $18 million for electricity it

51617 (Feb. 15, 2021).
4 Tex. Pub. Util. Comm'n, *Oversight of the Electric Reliability Council of Texas*, Project No. 51617 (Feb. 16, 2021).

generated due to the application of these short-pay procedures. CR32 ¶ 6; CR37 ¶ 30. This amount is a small part of aggregate multi-billion-dollar short-payment amount during the emergency. *See* CR192 ¶ 8; CR304–07.

After first trying to collect these amounts from short-paying market participants themselves, CR193 ¶ 10; ERCOT Protocol § 9.11.3(1)(a), the protocols then require ERCOT to implement its "Default Uplift" procedures to recover the additional revenue needed to pay generators in full. CR193–94 ¶¶ 10, 12; CR 32–43. Under this process, ERCOT allocates the loss caused by the defaults to other market participants using a complex formula based on financial settlement data. CR193 ¶ 10; ERCOT Protocol § 9.19.(1)(e) ("If sufficient funds continue to be unavailable for ERCOT to pay all amounts in full to short-paid Entities . . . ERCOT shall uplift short-paid amounts through the Default Uplift process . . . ."); ERCOT Protocol § 9.19.1(2) ("Each Counter-Party's share of the uplift is calculated using the best available Settlement data for each Operating Day in the month prior to the month in which the default occurred . . . .").

As ERCOT explains in its Appellant's brief, these protocol provisions guard against a potential wholesale electric market collapse by ensuring the continuing function of the market if some participants fail to pay in full and "provide a long term hedge by spreading out settlement risks across the market to minimize the possibility that one or more participants' defaults will cascade into a devasting

market collapse." ERCOT Appellant's Br. 7.

D. CPS's allegations arising from ERCOT's implementation of the Commission's directives during Winter Storm Uri, and ERCOT's implementation of the Protocols' short-pay and uplift provisions.

In the wake of Winter Storm Uri, CPS filed this case against ERCOT and its board and officers.[5] The suit complained of "Excessive Prices" and "Overcharges" in the ERCOT wholesale electric market during the storm. *E.g.*, CR31 ¶ 3. CPS complains particularly about $16 billion in charges marketwide after the EEA3 alert level had ended. *Id.*

CPS alleges that ERCOT should have "re-priced" these wholesale market transactions during the storm. It also alleges that ERCOT cannot apply the short-payment and default uplift protocols to a municipally owned utility under the Texas Constitution. CR31–33, 38–43, 32–38, 40–41. It sued ERCOT for breach of contract, negligence, gross negligence, breach of fiduciary duty, violation of the Texas Constitution, declaratory judgment, temporary and permanent injunctive relief, and asserted an additional request for damages. As ERCOT explains in its Appellant's brief, all of these claims are premised on specific allegations regarding ERCOT's carrying out its responsibilities as grid manager in implementing the Commission's directives, the Commission's rules, its own protocols, the Market

5 CPS originally filed the suit including ultra vires claims against all of ERCOT's board and some other ERCOT employees. CR30, 35, 45–46 ¶¶1, 17–20, 51–52. It eventually nonsuited all of the individual defendants other than William Magness, who is no longer ERCOT's CEO. CR404. It now pursues these claims only against Magness.

Participant Agreement that governed CPS's participation in the market, and its PURA statutory mandate. *E.g.*, ERCOT Appellant's Br. 33–34.

CPS's core requests are that the trial court re-price wholesale electricity transactions during the storm—something that, as explained below, both the Commission and the Texas Legislature in its 2021 Legislative Session declined to do—and exempt CPS from short-pay and default uplift procedures that it agreed to abide by though its participation in the ERCOT market. Rather than re-pricing wholesale electric sales during the emergency, the Legislature opted instead to enact several measures providing for financing of the default balances (described below) that were designed to avoid any need for a default uplift of the high costs and extraordinary charges that market participants incurred during the storm and provide them financial relief. And the net effect of CPS's latter request for an exemption to ERCOT protocols would be that CPS's potential share of the default amounts would be shifted to other market participants, with uncertain financial impacts upon these other market participants and the stability of the ERCOT market as a whole.

ERCOT filed a plea in the court below asserting that the Commission had exclusive jurisdiction over ERCOT's claims and that ERCOT had immunity against them. ERCOT further asserted that CPS's claims are barred because it failed to join the Commission, an indispensable party that has sovereign immunity. After the

district court denied ERCOT's plea, ERCOT filed this interlocutory appeal.[6]

E. The Texas Legislature's response to the Winter Storm Uri emergency.

As already noted, the Texas Legislature in its 2021 session declined to re-price wholesale electric transactions during Winter Storm Uri that reflected high scarcity pricing. A Senate Bill that would have done this failed to pass in the Texas House of Representatives. *See* Tex. S.B. 2142, 87th Leg., R.S. (2021). But the Legislature did pass, and the Governor signed, two bills that addressed the high energy prices and market shortfall during the emergency. *See* Act of May 30, 2021, 87th Leg., R.S., 2021 Tex. Sess. Law Serv. ch. 908 ("H.B. 4492"); Act of May 28, 2021, 87th Leg., R.S., 2021 Tex. Sess. Law Serv. ch. 950 ("S.B. 1580"). These new statutes, now codified into the Texas Utilities Code, created financing mechanisms to ensure that wholesale market participants that are owed money, as CPS alleges it is, are fully paid and to provide financial relief to the market participants for the extraordinary costs they incurred as a result of the unprecedented weather event.

S.B. 1580. This bill authorizes electric cooperatives—including two that owe $1.5 billion—to repay their debt through securitized financing. *See* TEX. UTIL. CODE §§ 41.153(c), 41.156; CR304–05. The legislation allows electric cooperatives to use this financing to recover the amounts defaulted during the winter storm. TEX. UTIL.

6 The Court has jurisdiction over this interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) because ERCOT qualifies as a "governmental unit" under that provision. ERCOT Appellants' Resp. to CPS Energy's Mot. to Dismiss 16.

CODE § 41.151(b). Bonds securitizing these amounts will be paid off by the defaulting cooperative's customers, TEX. UTIL. CODE §§ 41.152(10), 41.153(c), 41.156(a), and will not be paid for by other market participants like CPS or their customers.

H.B. 4492. This legislation authorized the use of up to $800 million from the State's rainy-day fund to finance the remaining $475 million of the market default that is attributable to competitive market participants. *See* H.B. 4492 § 1; CR304–05. Under this provision, ERCOT has applied for, and received, authorization to establish up to $800 million in debt financing for the "default balance." TEX. UTIL. CODE § 39.603(a)–(b). The statute mandates that this debt financing be repaid by all ERCOT wholesale market participants, including those in default but still participating in the market and those that enter the market after the financing order. TEX. UTIL. CODE § 39.603(d). The Commission has entered an order establishing this debt financing mechanism and the terms for repayment. Tex. Pub. Util. Comm'n, *Application of Electric Reliability Council of Texas, Inc. for a Debt Obligation Order Pursuant to Chapter 39, Subchapter M, of the Public Utility Regulatory Act*, Docket No. 52321 (Oct. 14, 2021). Under the statute, any challenge to the financing order must have been filed by a party to it within fifteen days of this order being signed by the Commission, or by October 29, 2021, in Travis County District Court. TEX. UTIL. CODE § 39.603(h). CPS did not seek to participate in this

Commission proceeding, and no party filed such a challenge to the financing order.

H.B. 4492 also authorized potential financial relief up to $2.1 billion for load-serving entities like CPS that were assessed certain extraordinary charges due to consumption during the storm, allowing them to finance these costs over time. *Id.* § 39.651(b), (d). This financing covers reliability deployment price adder and ancillary services costs in excess of the Commission's system-wide offer cap. *Id.* §§ 39.651(d), 39.652(4). CPS can choose to opt out of this financing mechanism and not seek to take advantage of it. *Id.* § 39.653(d). This statutory procedure is separate and distinct from the protocol requirements that CPS complains of in this suit. The Commission has entered an order establishing this financing relief for these extraordinary storm-related costs. Tex. Pub. Util. Comm'n, *Application of Electric Reliability Council of Texas, Inc. for a Debt Obligation Order Pursuant to Chapter 39, Subchapter N, of the Public Utility Regulatory Act*, Docket No. 52322 (Oct. 13, 2021). The Commission's financing order is subject to challenge only in the Travis County District Court, not in Bexar County District Court. *See* TEX. UTIL. CODE § 39.653(g). Under this new provision as well, any appeal to this order must have been filed no later than fifteen days after the Commission signed the order, or by October 28, 2021. *Id.* Again, CPS did not participate in this Commission proceeding, and no such appeal was filed by a party to it.

These 2021 legislative enactments provided new financing mechanisms to

address short-payments and other extraordinary costs arising from Winter Storm Uri.

III. Argument

A. PURA grants the Commission exclusive original jurisdiction over CPS's complaints about ERCOT's performance, including its implementation of Commission's directives and its accounting for wholesale electric sales during the emergency.

Under the Texas Constitution, Texas trial courts have general jurisdiction, except in those situations in which the Constitution or some other law confers exclusive, appellate, or original jurisdiction on some other court, tribunal, or administrative body. Tex. Const. art. V, § 8. Such is the case with CPS's allegations against ERCOT. Here, the Texas Legislature has granted the Commission the exclusive jurisdiction to address any allegations about ERCOT's performance as grid operator and its accounting for electric sales in the wake of the storm. Rather than bring such claims in court, CPS was required to present its allegations regarding ERCOT's performance as the Commission-designated independent organization to the agency.

1. Exclusive jurisdiction is a question of statutory interpretation.

As the Supreme Court has often stated, whether an agency has exclusive jurisdiction is a question of statutory interpretation. *In re Entergy Corp.*, 142 S.W.3d 316, 322 (Tex. 2004) (citing *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002)). Although some statutes contain an express statement

of exclusive original jurisdiction, it also can be shown through the legislative establishment of a "pervasive regulatory scheme." *E.g.*, *Oncor Elec. Delivery Co. v. Chaparral Energy, LLC*, 546 S.W.3d 133, 138 (Tex. 2018) ("*Chaparral Energy*") (quoting *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 624–25 (Tex. 2007)); *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006); *In re Entergy Corp.*, 142 S.W.3d at 322. By setting up a pervasive regulatory scheme, the Legislature "intended for the regulatory process to be the exclusive means of remedying *the problem* to which the regulation is addressed." *Chaparral Energy*, 546 S.W.3d at 138 (quoting *In re Sw. Bell*, 235 S.W.3d at 624–25) (emphasis added); *accord Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 544 (Tex. 2016) (quoting *Subaru*, 84 S.W.3d at 221); *In re Entergy Corp.*, 142 S.W.3d at 321–22 (same).

An express grant of exclusive jurisdiction in the statutory language is not required, as CPS argues. *E.g., Thomas*, 207 S.W.3d at 341 (finding exclusive jurisdiction even though statute did not include those words); *Emps. Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 908–09 (Tex. 2009) (exclusive jurisdiction requires express language *or* a pervasive regulatory scheme).

2. PURA establishes a pervasive regulatory scheme for the Commission's oversight of ERCOT and its accounting for wholesale electric sales.

The Legislature has established such a pervasive regulatory scheme for the Commission to manage Texas's electric markets and ensure system reliability.

Under this regulatory structure, the Commission oversees ERCOT's performance as its designated independent organization and addresses any issues with its work. This performance review includes CPS's specific allegations regarding the implementation of the Commission's directives after the Winter Storm Uri emergency and its decisions regarding accounting for wholesale electric sales in the wake of the emergency.

The Legislature set out the general framework under which the Commission regulates ERCOT's activities in connection with the State's electric markets in PURA:

> An independent organization certified by the commission is directly responsible and accountable to the commission. *The commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties.* The organization shall fully cooperate with the commission in the commission's oversight and investigatory functions.

TEX. UTIL. CODE § 39.151(d) (emphasis added). In carrying out its duties, ERCOT's actions must be "consistent with any rules or orders of the commission." *Id.* § 39.151(h).

Other provisions of section 39.151 of the Utilities Code also show that the legislative framework for Commission oversight of ERCOT is a pervasive regulatory scheme. These include provisions under which:

- The Commission certifies ERCOT as the independent organization, *Id.* § 39.151(c), empowering ERCOT to manage the grid and account for electric sales among market participants.

- The Commission "may delegate authority to [ERCOT] to enforce operating standards within the ERCOT regional electrical network and to establish and oversee transaction settlement procedures." *Id.* § 39.151(i).

- The Commission is authorized to allow ERCOT to draft its protocols (its own market rules) by delegating some of the agency's authority to "adopt and enforce rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants." *Id.* § 39.151(d). The market rules (protocols) that ERCOT adopts are subject to Commission approval and continuing oversight and review. *Id.* The Commission must approve them before they take effect. *Id.*

- The Commission may prescribe a system of accounts for ERCOT. *Id.* § 39.151(d-4)(2).

- The Commission may establish the terms and conditions for ERCOT's authority to oversee utility dispatch functions. *Id.* § 39.151(i).

The statute specifically mandates that the Commission supervise ERCOT's performance. *See Id.* § 39.151(d-3) (Commission approval of ERCOT's performance measures); *id.* § 39.151(d-4)(4) (inspection of ERCOT's facilities, records, and accounts). The agency is empowered to take "appropriate action" against ERCOT if it "does not adequately perform the organization's functions or duties." *Id.* § 39.151(d). It may assess administrative penalties against ERCOT. *Id.* § 39.151(d-4)(5). If ERCOT's conduct justifies it, the Commission is even empowered to decertify it as the independent organization and certify a replacement

to assume its grid-management responsibilities. *See id.* § 39.151(d). And here the statute grants the Commission the specific authority to "resolve disputes between an affected person and [ERCOT]." *Id.* § 39.151(d-4)(6). The Commission has adopted its Rule 22.251, setting out in detail how the Commission reviews ERCOT's actions and resolves complaints brought by "affected entities." 16 TEX. ADMIN. CODE § 22.251(a).[7]

The Commission's remedial powers against ERCOT are broad: it is empowered to take any action it deems appropriate. TEX. UTIL. CODE § 39.151(d) ("The commission may take appropriate action against an organization that does not adequately perform the organization's functions or duties."). As noted, PURA provides a couple of examples of remedial measures the agency could take (decertification and administrative penalties), but the list is non-exhaustive. *Id.* The agency is not limited in how it may seek to remedy ERCOT's alleged misconduct, taking into account (as it must) the impacts of that remedy upon the proper functioning of the electric grid and the wholesale electric market.

[7] "The scope of permitted complaints includes ERCOT's performance as an independent organization under the [Public Utility Regulatory Act] including, but not limited to, ERCOT's promulgation and enforcement of procedures relating to reliability, transmission access, customer registration, and accounting for the production and delivery of electricity among generators and other market participants." 16 TEX. ADMIN. CODE § 22.251(b). If the Commission finds merit in a complaint and that "corrective action" is required, the Commission shall issue an order granting appropriate relief. 16 TEX. ADMIN. CODE § 22.251(o).

There is no question that CPS could bring a complaint at the Commission about ERCOT's implementation of the Commission's directives and its own accounting for the wholesale electric sales during the emergency. CPS has alleged that ERCOT violated its protocols and the Market Participant Agreement; the Commission has exclusive jurisdiction over these issues and must determine whether any violation occurred. Under the Protocols, market participants like CPS can complain to ERCOT abouts its invoices, ERCOT Protocols § 9.14, and invoke ERCOT's alternative dispute resolution procedure if dissatisfied. *Id.* at § 20.1. Market participants may then appeal to the Commission. 16 TEX. ADMIN. CODE § 22.251(b)–(c). And the Commission's orders, including its actions with respect to ERCOT and its review of ERCOT's accounting for wholesale electric sales, are subject to judicial review under the Texas Administrative Procedure Act. TEX. UTIL. CODE § 15.001 (parties to Commission proceeding entitled to judicial review under the substantial evidence rule); TEX. GOV'T CODE § 2001.171 *et seq.*

Whether CPS would qualify as an "affected person" under the definition in TEX. UTIL. CODE § 11.003(1) does not bear upon its authority with respect to such disputes over invoices or the Commission's "complete" authority over ERCOT's operations. TEX. UTIL. CODE § 39.151(d). CPS would certainly qualify as an "affected entity" under the Commission's rules, as the rules allow any "affected entity" to file complaints about ERCOT's performance and operations. 16 TEX.

ADMIN. CODE § 22.251(b). Indeed, the Commission's broad authority under TEX. UTIL. CODE § 39.151(d) would allow it to investigate ERCOT *sua sponte* and take any appropriate remedial action. If CPS brought its complaint to the Commission, the Commission would address it. Indeed, CPS has brought complaints about ERCOT to the Commission in the past. CPS has not opted to take the appropriate course of action in this instance, instead seeking relief from a Bexar County District Court that lacks jurisdiction over these regulatory concerns.

In total, these statutory provisions demonstrate that the Commission's oversight of ERCOT constitutes a pervasive regulatory scheme and that the Commission has exclusive original jurisdiction over CPS's claims regarding ERCOT's performance as the independent organization. The specific "problem" to which these statutes are addressed, *e.g.*, *Chaparral Energy*, 546 S.W.3d at 138, includes how ERCOT handled the Winter Storm Uri emergency and its aftermath. Requiring the Commission to review ERCOT's performance, and remedy any issue with it, employs the advantages of administrative agencies—carrying out policy consistently, and using agency expertise to resolve complex problems. *See, e.g.*, *State v. Associated Metals & Minerals Corp.*, 635 S.W.2d 407, 409 (Tex. 1982). CPS's suit would instead substitute the judgment of a state district court for that of the expert agency that the Legislature has charged with addressing these complex and highly technical issues.

CPS's Texas constitutional claims are not exempt from the Commission's exclusive jurisdiction. The Commission needs to address CPS's numerous non-constitutional claims (including the alleged protocol violations intertwined with them) before a court may consider the constitutional questions. *See Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006); *Clint Indep. School Dist.*, 487 S.W.3d at 552–53. The Supreme Court has rejected a global exemption to "statutory exhaustion-of-administrative-remedies requirements." *Clint Indep. School Dist.*, 487 S.W.3d at 552 n.9. In *Clint*, the problem underlying the constitutional claims that a school district's allocation of funds among its schools violated the Texas Constitution was within the Commissioner of Education's exclusive jurisdiction; the court rejected plaintiff's argument that they need not exhaust their administrative remedies because the claims were constitutional. Exhaustion is required if a constitutional claim is "ancillary to and supportive of" a claim within the agency's exclusive jurisdiction. *Id*. at 553 (quoting *Jones v. Clarksville Indep. School Dist.*, 46 S.W.3d 467, 474 (Tex. App.—Texarkana 2001, no pet.)); *see also City of Dallas v. Stewart*, 361 S.W.3d 562, 579–80 (Tex. 2012) (exhaustion required so agency can decide factual and legal questions within its competency before court considers constitutional claims); *Rourk*, 194 S.W.3d at 502 (taxpayers required to exhaust administrative remedies before constitutional claims adjudicated). The same administrative exhaustion requirement would apply to CPS's

purported common-law claims. *See Chaparral Energy*, 546 S.W.3d at 141–42 (explaining a "hybrid claims-resolution process" under which agency first addresses all regulatory issues.)

And again, the Commission's actions with respect to ERCOT and its review of ERCOT's accounting for wholesale electric sales, and its resolution of any complaints about ERCOT's invoices, are subject to judicial review under the Texas Administrative Procedure Act ("APA").

3. The Supreme Court has found the Commission had exclusive jurisdiction in several analogous situations.

In re Entergy Corporation, *In re Southwestern Bell Telephone Company*, and *Chaparral Energy* all addressed challenges to the actions of a Commission-regulated entity in connection with matters within the scope of the Commission's regulatory authority. In all these cases, the Supreme Court held the Commission's jurisdiction was exclusive.

In re Entergy involved ratepayers' claim that a regulated utility had breached a commitment to share the utility's savings resulting from a merger with its ratepayers. 142 S.W.3d at 319–20. The Court noted that the Commission's involvement with this agreement gave it an administrative character that conferred exclusive jurisdiction over the contract's interpretation and effect. 142 S.W.3d at 323–24 (rejecting argument that the agreement at issue was a mere private contract because it took on an administrative character when approved). This is

unquestionably true of the Market Participant Agreement provided for in the Protocols that CPS agreed to abide by in participating in the ERCOT wholesale market. The Commission has authority to regulate the operations and accounting of a regulated electric utility such as Entergy, *see id*. at 323; the Commission has even more extensive "complete" authority to regulate the particulars of the operations of its designated independent organization/grid manager ERCOT. Similarly, *In re Southwestern Bell* involved a challenge to a telecommunications utility's collection of universal service fund charges from ratepayers; as required by statute, the Commission had established procedures for the universal service fund and for resolving disputes regarding it. 235 S.W.3d at 623–26. Finally, in *Chaparral Energy*, the court held that a dispute over an agreement involving a utility's services in the construction of new facilities to bring electricity to Chaparral's wells was within the Commission's exclusive jurisdiction in light of PURA's express language as well as the comprehensive regulatory scheme the statute created. 546 S.W.3d at 141.

Here, the Commission's "complete" authority over ERCOT under PURA represents a "pervasive regulatory scheme" like those involved in these cases.[8] Artful pleading of purported common-law claims cannot be used to evade the

[8] The Commission's jurisdiction here is exclusive even though the statute says the agency "may" resolve disputes involving ERCOT. TEX. UTIL. CODE § 39.151(d-4)(6). Notably, the word "may" was also used in the statute the Supreme Court relied upon in finding exclusive original jurisdiction in *In re Southwestern Bell*. *See* 235 S.W.3d at 625–26 (citing TEX. UTIL. CODE § 17.157(a), (b)(1)).

Commission's exclusive jurisdiction over allegations that arise from these regulatory responsibilities. When an agency has exclusive jurisdiction in a particular area, a party may not circumvent it simply by re-casting a claim in terms that would otherwise be cognizable in the courts. *E.g.*, *Clint Indep. Sch. Dist.*, 487 S.W.3d at 547 ("The nature of the claims, rather than the nomenclature, controls, and artful pleadings cannot circumvent statutory jurisdictional prerequisites."); *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) (requested damages award would circumvent Workers' Compensation Commission's exclusive jurisdiction; a damages claim "is made no more viable simply by restating it under the other legal theories she asserted—negligence, fraud, and statutory violations.").[9]

4. The Supreme Court's recent decisions involving the Commission's exclusive jurisdiction do not change this.

The cases recently decided by the Supreme Court involving the Commission's exclusive jurisdiction do not undercut its "complete" authority over ERCOT. All three cases involved whether the Commission had exclusive jurisdiction over the activities of a regulated utility. None involved the very specific context here—the Commission's "complete" control over its designated electric grid operator,

[9] Nor would any request for damages by CPS impact the Commission's exclusive jurisdiction. *In re Entergy*, *In re Southwestern Bell,* and *Chaparral Energy* all involved damages claims—in those cases, purportedly for breach of contract. *In re Entergy*, 142 S.W.3d at 320; *In re Sw. Bell Tel. Co.*, 235 S.W.3d at 623; *Chaparral Energy,* 546 S.W.3d at 137. Requests for damages did not undercut the Commission's exclusive jurisdiction over the underlying dispute in those cases.

ERCOT, which is governed by highly prescriptive PURA provisions detailing the Commission's authority. And in each of these cases, the matter at issue was deemed to be outside the scope of the Commission's regulatory authority over the utilities involved and, thus, not within the agency's exclusive jurisdiction. All of CPS's claims against ERCOT, by contrast, are within the scope of the Commission's regulatory authority.

The claims at issue in *In re Oncor Electric Delivery Company, LLC*[10] arose from the utility's alleged negligence in failing to trim trees around electric distribution and service lines; the Supreme Court held that plaintiff's allegations "do not rely on a utility acting in its regulated capacity, nor on a disruption of or failure to provide electric service. Negligence alleged in a context merely coincidental to utility activities does not create Commission jurisdiction." *Id.* at *1. *In re Texas-New Mexico Power Company*[11] involved the alleged negligence of the utility's construction contractor in failing to secure construction materials, allegedly resulting in flooding; the Supreme Court held the complaint was not about the utility's operations and services (and thus not within the Commission's exclusive jurisdiction). *Id*. at 45 ("Although the negligence Plaintiffs allege occurred in the

[10] *In re Oncor Elec. Delivery Co.*, No. 19-0662, 2021 WL 2605852 (Tex. June 25, 2021) (orig. proceeding).
[11] *In re Tex.-N.M. Power Co.*, 625 S.W.3d 42 (Tex. 2021) (orig. proceeding).

context of construction on utility facilities, that context is merely a coincidence."). Finally, *In re CenterPoint Energy Houston Electric, LLC* [12] involved an electrocution death and an allegation of negligence in the utility's sizing of a fuse on an electric line. A plurality of the Supreme Court, in finding the Commission did not have exclusive jurisdiction, noted that the Commission had not regulated in the area and that the utility's "own evidence in the trial court confirms that industry practice—not a regulatory scheme—informs its duty with respect to fuse size." *Id*. at *10.

All three cases (*Oncor*, *Texas-New Mexico Power*, and *CenterPoint*) stand in stark contrast to the Commission's "complete" control over ERCOT's operations—including particularly its implementation of the Commission's directives and its accounting for wholesale power sales under the terms specified in its Protocols.

5. CPS's suit interferes with the Commission's critical oversight of ERCOT and Texas's wholesale electric market and is contrary to the Legislature's policy judgment with regard to Winter Storm Uri costs.

As the Supreme Court has explained in other contexts, recognizing the Commission's exclusive jurisdiction is essential to protecting the Legislature's regulatory plan. *In re Entergy Corp.*, 142 S.W.3d at 321 ("permitting a trial to go forward [if the Commission has exclusive jurisdiction] would interfere with the

[12] *In re CenterPoint Energy Hous. Elec., LLC*, No. 19-0777, 2021 WL 2671808 (Tex. June 30, 2021) (orig. proceeding) (plurality op.).

important legislatively mandated function and purpose of the PUC. . . . [T]he judicial appropriation of state agency authority would be a clear disruption of the 'orderly processes of government.'"). CPS's claims relating to electric sales during Winter Storm Uri present exactly such a danger with regard to the Commission's oversight of ERCOT. The storm's impacts only underscore the critical, life-or-death importance of protecting the Commission's "complete" control over ERCOT's operations and its ability to remedy any issues with the grid operator's performance.

The Commission's exclusive jurisdiction is all the more important because ERCOT is a nonprofit organization. In providing for the Commission to designate and oversee the independent organization, the Legislature specifically required that the Commission control its finances, down to particulars. Thus, the Commission reviews and approves ERCOT's budget and is authorized to approve, disapprove, or modify any single expense item. *See* TEX. UTIL. CODE § 39.151(d-1). To fund ERCOT, the Legislature provided for the Commission to set a "system administration fee" that is charged to wholesale buyers and sellers in the ERCOT market. TEX. UTIL. CODE § 39.151(e).

The net effect of much of the relief CPS requests would be to shift CPS's responsibility for the amount it agreed to pay by participating in the ERCOT wholesale market to other wholesale market participants and, ultimately, to their customers. But by participating in the ERCOT market, CPS had agreed to the

ERCOT market rules, including its uplift provisions that govern how short-payment amounts are addressed (and that CPS has, in fact, abided by for years). Changing the market rules as CPS effectively demands would represent a fundamental redesign of the ERCOT wholesale market. Such a change could have unpredictable, potentially grave adverse impacts on these other market participants and the ERCOT market as a whole. Though it might save CPS some money, it would inevitably saddle other entities, differently situated, with expense not contemplated by the ERCOT protocols or the Market Participant Agreement. Given this potential impact on other entities, it is critical that the Commission—the expert agency that the Texas Legislature has charged with overseeing the ERCOT grid and wholesale electric market—should assess the potential impacts on the entire ERCOT market, and *all* market participants, in considering what relief is appropriate.

As for a potential damages award, that, too, would ultimately be paid by other market participants and end-users. Because ERCOT is a nonprofit organization that acts as a clearinghouse in the market, it is not the entity that would ultimately bear the financial impact for an award of $18 million that CPS says it is still owed for the electricity it sold during the emergency. With its extensive authority over ERCOT's budget, the Commission needs to approve the payment of the judgment, and any similar judgment obtained by other market participants. And the Commission would have to approve any increase in the system administration fee needed to pay it or

other similar judgments. Any amounts that might be assessed upon wholesale electric market participants through this increased fee are ultimately borne by electric customers in the ERCOT power region. Thus, in this event, a damages judgment would not really be paid by ERCOT. As with the requested injunction exempting CPS from the application of the short-pay or default uplift protocols, it would be paid by other market participants and, ultimately, by Texas consumers through their electric bills.

B. ERCOT has immunity against CPS's allegations over ERCOT's operations as an arm of the state charged with a governmental function.

The Commission's exclusive jurisdiction over ERCOT's operations is coupled with ERCOT's immunity against allegations such as CPS's. "Sovereign immunity refers to the State's immunity from suit and liability." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). It protects the State and "various divisions of state government, including agencies, boards, hospitals, and universities." *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 324 (Tex. 2006). It also extends to political subdivisions of the state. *Rosenburg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 741 (Tex. 2019) (governmental immunity afforded to political subdivisions of the State, including counties, cities, and school districts as an "extension" of the State's sovereign immunity).

As discussed above, by statute the Commission certificates ERCOT to perform public functions and its management of the electric grid. If a legislatively authorized entity of this sort has been vested by the Legislature with "'the nature, purposes, and powers' of an 'arm of the State government,'" it enjoys immunity identical to that of any state instrument. *El Paso Educ. Initiative, Inc. v. Amex Properties*, LLC, 602 S.W.3d 521, 527 (Tex. 2020) (quoting *Ben Bolt-Palito Blanco*, 212 S.W.3d at 325); *Univ. of the Incarnate Word v. Redus*, 602 S.W.3d 398, 405 (Tex. 2020) (quoting same). Such is the case here. The Legislature has established ERCOT as an arm of the state, performing critical governmental functions.

In *Amex Properties*, the Supreme Court held that a charter school—organized as a private, nonprofit organization—was immune. 602 S.W.3d at 529. The school operated under a contract with the State that provided accountability by requiring it to follow state law and regulations or face revocation of its charter. *Id*. at 528–29. Conferring immunity on the charter school satisfied immunity's purpose, respecting the constitutional obligation to provide free public education. *See id*. at 529–30.

By contrast, in *Rosenburg*, the Court decided that a municipally created nonprofit (an economic development corporation, or "EDC") did not have governmental immunity. Noting that the statute involved there was a "mixed bag," 571 S.W.3d at 750, the Supreme Court focused on statutory provisions that indicated the intent to deny governmental status: the explicit rejection of "political

subdivision" status for EDCs and a prohibition on exercising "attributes of sovereignty." *Id*. at 746, 749.

Finally, in *University of Incarnate Word*, the Supreme Court found that the private university involved in that case—of which the university police force was only a small part—was not entitled to immunity. But there is a key distinction between the university and ERCOT: the university police force was not accountable to government and thus not an arm of the State. *University of Incarnate Word*, 602 S.W.3d at 408. The university was "not accountable to the taxpayers or public officials" with respect to the police force's operations. *Id*. at 407, 408. The opposite is true of ERCOT: the above discussion demonstrates that the Commission exerts complete control over ERCOT in the totality of its operations as grid manager. The opinion further notes that sovereign immunity was "entity based," and the university involved in that case did not act as an arm of the State in its overall operations. *University of Incarnate Word*, 602 S.W.3d at 401, 407. ERCOT, by contrast, is entirely focused on its statutorily mandated governmental function.

The allegations at issue here—relating to ERCOT's implementation of Commission directives, and its accounting for wholesale electric sales during the emergency among market participants—involve a statutorily mandated governmental function performed by the entity the Legislature has established as an arm of the State. Immunity's application here would serve the doctrine's purposes—

preserving the critical governmental services that ERCOT provides and preserving the separation of powers by preventing a court from assuming a critical regulatory function of an expert state agency. The State's immunity thus extends to ERCOT.[13]

C. To the extent CPS challenges the Commission's February 15 and 16 directives to ERCOT, its claims are an improper collateral attack on the agency's determinations.

As discussed, CPS's claims center on alleged "Excessive Pricing" and "Overcharges" for wholesale electricity during the Winter Storm Uri emergency. It cites the February 15 and 16 directives that the Commission issued during the emergency regarding prices in the wholesale electric market. CPS nonetheless insists that it does not complain about the Commission's actions, only ERCOT's. CPS Appellee's Br. 25–26. But to the extent that CPS's "Excessive Pricing" and "Overcharge" claims actually complain about the Commission's own decisions and directives to ERCOT, they represent an improper collateral attack on a Commission order. To the extent that judicial review of the Commission's determinations is available, under the Texas APA exclusive jurisdiction is vested in the Travis County District Court. *See* TEX. UTIL. CODE §§ 15.001 (parties to Commission proceeding entitled to judicial review under the substantial evidence rule), 15.002 (commission must be a defendant in suit for judicial review); TEX. GOV'T CODE § 2001.176(b)(1)

13 CPS has not pleaded any valid waiver of this immunity. *See* ERCOT Appellant's Br. 50–61; ERCOT Reply Br. 31–37.

(suit must be filed in Travis County district court).[14] The Bexar County District Court where CPS filed its suit lacks jurisdiction.

CONCLUSION

The Commission has exclusive original jurisdiction over CPS's claims arising from ERCOT's performance as the agency's designated "independent organization" and electric-grid operator and its implementation of the Commission's directives. The Commission's complete authority over ERCOT is coupled with ERCOT's immunity against CPS's claims relating to ERCOT's performance and ERCOT's accounting for wholesale electric sales involving market participants as its protocols mandate. To the extent that CPS challenges the directives in the Commission's February 15 and 16 orders, any available challenge to these orders would be within the exclusive jurisdiction of the Travis County District Court. The Bexar County District Court lacked jurisdiction over CPS's claims, and they should be dismissed.

Respectfully submitted,

KEN PAXTON
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14 One electric generator has filed an appeal of the February 15 and 16 orders in the Third Court of Appeals, contending it is a "competition rule" that may be directly appealed to that court under TEX. UTIL. CODE § 39.001(e). *Luminant Energy Co. v. Pub. Util. Comm'n*, No. 03-21-0098-CV (Tex. App.—Austin March 2, 2021). Suits challenging the February 15 and 16 orders also have also been filed in Travis County District Court. *Exelon Generation Co. v. Pub. Util. Comm'n of Tex.*, No. D-1-GN-21-001772 (D. Travis Cnty., Tex. Apr. 19, 2021); *RWE Renewables Americas, LLC v. D'Andrea*, No. D-1-GN-21-001839 (D. Travis Cnty., Tex. Apr. 21, 2021).

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing computer-generated document has 8,177 words, calculated using the computer program Microsoft Word, pursuant to Texas Rule of Appellate Procedure 9.4.

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CERTIFICATE OF SERVICE

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Associated Case Party: CPS Energy

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